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IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 1216

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

On Petition for Certiorari

BRIEF FOR NEW YORK STATE LABOR RELATIONS BOARD IN OPPOSITION TO PETITION

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Opinions Below

The decision and order of the New York State Labor Relations Board (hereinafter referred to as the Board) is reported in 5 S. L. R. B. (N. Y.) 1350 (R. pp. 1329-1358). The decision of the Special Term, Supreme Court of the State of New York, New York County, denying petitioners' motion to vacate the Board's order, is not officially reported and appeared in the New York Law Journal (Vol. 109, No. 130, June 5, 1943).

The decision of the Appellate Division, First Judicial Department, affirming the order made at Special Term, is reported at 268 App. Div. 759 (case 4). The decision of the Appellate Division, denying petitioners' motion for

leave to appeal to the Court of Appeals, is reported at 268 App. Div. 849 (case 6). The decision of the Court of Appeals of the State of New York, denying petitioners' motion for leave to appeal to it, is reported in 293 N. Y. (Weekly Advance Sheet No. 297, Jan. 6, 1945, p. i).

No opinions were written by any of the courts below, except for the memorandum contained in the short form order made at Special Term (R. 4).

Jurisdiction

Jurisdiction to entertain this petition is claimed under the Judicial Code, Section 237(a) amended (28 U. S. C., Sec. 344).

Question Presented

The question presented is whether an order of the Board, directing petitioners to cease and desist from interfering with, restraining and coercing their employees in violation of the provisions of the New York State Labor Relations Act, contravenes the constitutional right of free speech.

Constitutional and Statutory Provisions Involved

The relevant portions of the Constitution of the United States are set forth in the Appendix to petitioners' brief, page 26.

The sections of the New York State Labor Relations Act involved, are:

> Sections 701 (2), 703, 704 (4), (5) and (10), set forth in the Appendix to petitioners' brief, pages 25-6.
>
> Sections 706, 707 (1), (2), (3) and (4), set forth in the Appendix to this brief, pages 21 to 25.

Statement

The Board is a duly constituted administrative agency of the State of New York. It operates pursuant to the New York State Labor Relations Act, Article 20 of the Labor Law of the State of New York, hereinafter called the Act. The Act is patterned on, and similar to, the National Labor Relations Act.

Proceedings Before the Board

The unfair labor practice proceeding before the Board, here involved, followed the course prescribed by Section 706 of the Act (Appendix, pp. 21 to 23), that is, complaint, notice of hearing, answer, hearings before a Trial Examiner with full opportunity to offer evidence, examine and cross examine witnesses, issuance of Trial Examiner's Intermediate Report, exceptions filed thereto, argument before the Board, and issuance of the Board's decision containing a discussion of the evidence, findings of fact, conclusions of law and order.

The Board's order, dated December 30, 1942 (R. 1329-1358), in substance, directed petitioners to offer reinstatement to, and make whole, two employees discharged because of their union activities, and to cease and desist from interfering with, restraining and coercing their employees in the exercise of their rights to join and assist a labor organization of their own choosing.

Proceedings in the Courts

Pursuant to Section 707 of the Act (Appendix, pp. 23 to 25), petitioners applied at Special Term of the Supreme Court of the State of New York for an order vacating the Board's order. At the same time the Board applied for an order of the Court enforcing the Board's order.

On June 4, 1943, an order was duly made by the Supreme Court of the State of New York, County of New York, denying petitioners' motion to vacate the Board's order.

On August 18, 1943, an order was duly made by the Supreme Court, New York County, enforcing the Board's order, in whole. *No appeal has been taken from this order and the order remains outstanding and unappealed.*

Petitioners appealed from the order dated June 4, 1943, which denied their motion to vacate the Board's order. The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirmed the order (268 App. Div. 759). The Appellate Division thereafter denied an application by petitioners for leave to appeal to the Court of Appeals (268 App. Div. 849). A similar motion by the petitioners was also denied by the Court of Appeals itself (293 N. Y. ——; Advance Sheet #297, Jan. 6, 1945, p. i).

Summary of Argument

I

Petitioners seek a writ of certiorari to review an order of the Supreme Court, New York County, entered upon the remittitur of the Court of Appeals of the State of New York, *denying leave to appeal to the Court of Appeals.* Petitioners' specification of errors charges the alleged errors to the Court of Appeals.

The Appellate Division, First Judicial Department, was the highest court in the State of New York which adjudicated the merits of the controversy here involved. The Court of Appeals merely denied a motion by petitioners for leave to appeal.

The writ which petitioners seek, therefore, is directed to the wrong court, and the errors which they specify are charged to the wrong court.

II

The record herein discloses petitioners' intense hostility to unions, discharge of employees for union activities, and utterances which were coercive, inherently and in context. The Board's order, based "on the entire record" (R. 1351, fol. 4052) does not contravene petitioners' right of free speech. That right may not be used as a shield for coercive action in violation of the Act.

The fact that the order which petitioners seek to review was made by a state labor relations board rather than by the National Labor Relations Board, raises no novel question.

POINT I

The petition should be dismissed, for it seeks a writ directed to, and charges errors to, a court which has not adjudicated the merits of the controversy.

Petitioners herein pray "that a writ of certiorari issue to review the final order entered on December 8th, 1944 (R. 1403-4), upon the Remittitur of the Court of Appeals, the highest court of the State of New York (R. 1402), *denying leave to appeal to the Court of Appeals,* from an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on June 8th, 1943 (R. 4), denying petitioners' application to vacate and set aside the Decision and Order of the New York State Labor Relations Board dated December 31st, 1942 (R. 1329-59)" (Petition, pp. 2-3) (italics ours).

Petitioners' Specification of Errors (Petition, p. 30) is based on the ground that "the Court of Appeals of the State of New York erred: * * *."

It is respectfully submitted that the Court of Appeals of the State of New York did not adjudicate the merits of this case, but merely denied an application by petitioners for leave to appeal, and, accordingly, that the writ of certiorari which petitioners seek is addressed to the wrong court and the petition should be dismissed.

The Board's order herein was issued on December 31, 1942. Thereafter, pursuant to Section 707 of the Act, petitioners instituted court proceedings to vacate and set aside the Board's order. The Board, simultaneously, instituted court proceedings for enforcement of its order.

On June 4, 1943, an order was duly made by the Supreme Court of the State of New York, County of New York, denying petitioners' motion to vacate the Board's order. On August 18, 1943, an order was duly made by the same court, enforcing the Board's order in whole.

Petitioners appealed only from the order dated June 4, 1943, which denied their motion to vacate the Board's order. No appeal was taken from the order of August 18, 1943, enforcing the Board's order, and said order remains an outstanding, unappealed final order.

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirmed the order of June 4, 1943, denying petitioners' motion to vacate the Board's order. Petitioners' motions for leave to appeal were denied by the Appellate Division on June 9, 1944, and by the Court of Appeals on November 30, 1944. On December 8, 1944, an order was entered in the Supreme Court, New York County, on remittitur from the Court of Appeals, making the order of the Court of Appeals, denying leave to appeal thereto, the order of the Supreme Court, New York County.

Wholly apart from the fact that the final order of the Supreme Court, New York County, dated August 18, 1944, enforcing the Board's order, is outstanding and unappealed, it is clear that the petition herein is based on erroneous procedure and that the writ sought is not directed to the proper court.

The Court of Appeals' only act was to deny petitioners' motion for leave to appeal. The order of the Supreme Court, New York County, dated December 8, 1944, which petitioners term a "final order," was for the purpose of taxing costs. It was merely a ministerial act of the lower court following denial of leave to appeal by the Court of Appeals (*Department of Banking, State of Nebraska* v. *Pink*, 317 U. S. 264).

The highest court of the State of New York which has adjudicated the merits of the controversy is the Appellate Division of the Supreme Court of the State of New York, and it is to that court that the writ of certiorari should have been directed. This error in the petition is fatal and requires its dismissal.[1]

Moreover, petitioners' Specification of Errors relates to alleged errors committed by the Court of Appeals and speaks of the "holding, in effect by affirmance * * *" of that court. As we have pointed out, however, the Court of Appeals did not affirm the order of the Appellate Division, but merely denied leave to appeal. The alleged errors which petitioners seek to review, therefore, are not imputable to the Court of Appeals, but only to the Appellate Division, the highest State court which adjudicated the

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1. *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; *Second National Bank* v. *First National Bank*, 242 U. S. 600; *Cuyahoga River Power Co.* v. *Northern River Realty Co.*, 244 U. S. 300; *Chicago and Eastern Illinois R.R. Co.* v. *Industrial Commission*, 284 U. S. 296; *Missouri Kansas & Texas Ry. Co.* v. *Elliott*, 184 U. S. 529; *Bacon* v. *State of Texas*, 163 U. S. 207; *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 251; *Randall* v. *Board of Commissioners etc.*, 261 U. S. 252.

merits of the controversy. This deficient assignment of errors by petitioners constitutes additional ground for dismissal of the petition.[2]

It is respectfully submitted, therefore, that the petition herein should be dismissed on the grounds (a) the petition seeks a writ addressed to a court which has not adjudicated the merits of the case, (b) it seeks review of an order denying leave to appeal, which order is not appealable, and (c) is based on a Specification of Errors which is not only lacking in certainty and definiteness, but which is erroneously charged to the wrong court.

POINT II

The petition should be denied, for no novel or even substantial question is presented.

Section 704, subdivision 10 of the New York State Labor Relations Act provides that it shall be an unfair labor practice for an employer to "interfere with, restrain or coerce employees" in the exercise of the rights guaranteed by Section 703 of the Act. The rights guaranteed by Section 703 are: "* * * to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, * * *."

The Board found, and the courts below have sustained the finding, that petitioners "interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (R. 1353).

The Board also found, and this finding too has been sustained by the courts below, that petitioners unlawfully dis-

2. *Local #167, International Brotherhood etc.* v. *U. S.*, 291 U. S. 293; *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86.

charged two employees, Jay Irving and Edwin R. Cohen, in violation of Section 704, subdivisions 4 and 5 of the Act (R. 1353).

The Board accordingly directed petitioners to cease interfering with their employees' exercise of their rights under the Act and to offer reinstatement to, and make whole, the two discharged employees upon their return to civilian life (R. 1355-7).

We shall recount the facts briefly and then show that under well settled law the right of free speech does not excuse the coercive actions of petitioners.

THE FACTS

By way of preliminary, we respectfully remind the Court that an employer's antipathy to unions and the existence of other unfair labor practices, prior or concurrent, are properly to be considered in determining whether the Act has been violated. As this Court said in *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 587, 588:

> "The employer's attitude towards unions is relevant."

Petitioner Sam Marcus, in addition to doing business as Marcus Photo Service and as Fotoshop, is president of 42nd St. Foto Shop, Inc. and Fotoshop, Incorporated. He owns and controls all the petitioners' enterprises (R. 736, 737). The Board found that "all these undertakings constitute one single enterprise responsible for compliance with the Act" (R. 1336).

Background

The record contains uncontradicted testimony that Marcus and his wife, who took an active part in management, were intensely hostile to unions. They and supervisory employees made numerous remarks calculated to dis-

courage self-organization among their employees. A few illustrations follow.

Mrs. Marcus told the employees: "Unions seem to be created for the purpose of annoying employers" (R. 572). During a strike at Gimbel's Department Store, she said that "she made it a point of going into Gimbel's every day just to walk through, whether she bought anything or not, just to show the pickets" (R. 422). Irving, one of the discharged employees, testified that when Marcus hired him he said "his employees could always come to him with their problems and there is no necessity of going to unions, and his employees don't believe in unions" (R. 663).

Irving testified that during a strike of photo finishers at the Marcus Photo Service in the fall of 1941, Marcus called the striking employees "a bunch of ingrates who didn't know when they were well off and that it was unfortunate that they will have to lose their jobs because of being misguided by a racketeering union" (R. 429). Mrs. Marcus and Andorn, her brother, who was head of the camera department, made similar comments (R. 428).

During the 1941 strike Irving was asked to sign a statement that the employees had no desire to join the striking union (R. 431). The statement referred to that union in derogatory terms (R. 431-2). About the same time a leaflet, purportedly prepared by the employees but actually prepared by the management, was distributed to customers (R. 435). It contained the following paragraph (Bd.'s Exh. 10, printed, R. 1194-5, offered R. 442):

> "We are emphatic in our desires to remain free men and not being enslaved by union racketeers. We have personally, and of our own volition, petitioned our employers not to sign our liberties away to this union *or any other union.* This arrogant attempt of racketeers to muscle-in on our pay envelopes is a direct attack on our liberties and livelihood, even more so than on our employers" (Bd.'s Exh. 10, fol. 3581). (Italics ours.)

Neither Marcus nor his wife, nor any supervisory official took the stand to deny the foregoing.

The Unfair Labor Practices

In the early part of January, 1942, Retail Employees Union, Local 830, C. I. O., herein called the Union, started to organize petitioners' employees. Two employees, Irving and Cohen, were among the first to join the Union and most active in its organizational drive. Irving was discharged on January 12, 1942, and Cohen on January 23, 1942. The Board found, and the courts below have sustained the finding, that both Irving and Cohen were discharged because they had joined and assisted the Union (R. 1353).

On January 24, 1942, the day following the discharge of Irving, Kaplan, the manager, asked Bordin, one of the employees, whether he was "involved in unionization" and advised him to "have nothing to do with the foolish kids who are trying to unionize the Foto Shops," and to keep his "nose clean" (R. 693-5). Two days later Kaplan said to Bordin: "Say, Bob, are you keeping your nose clean?" and asked Bordin who had given him the Union application card: "Was it anybody who is working there, or was it Irving or Cohen?" (R. 698-700).

As part of the organizing campaign among petitioners' employees, the Union, on February 2, 1942, distributed a leaflet to recruit new members (Bd.'s Exh. 9, printed, R. 1192-3, offered, R. 299). The very next day, Marcus called a meeting of the employees, about forty or fifty in number, and made a speech[3] in which he called the Union "a bunch of racketeers and gangsters." He threatened to discharge

3. Petitioners advert to the fact that the witness Rafalow was an "atheist," and, although no federal issue is involved and no error specified, apparently question the value of his testimony as to the speech made by petitioner Marcus. Rafalow's testimony was fully corroborated by two other witnesses (R. 332-6, 701-6). The testimony of all three was uncontroverted. Peti-

the younger employees if the Union obtained a collective bargaining contract and warned the older employees that this would mean additional work for them. He suggested that the employees abandon the "outside" union and form a company union. "Why give your money to outside crooks, have a union among yourselves" (R. 259-261, 332-6, 706, 1189-91).

Bordin, one of the employees, testified that early in February, 1942, Marcus had told him that "I should have nothing to do with unions and I could advance myself like Mr. Hervich has" and that Irving had been let go because of union activity (R. 708).

Marcus did not testify.

Petitioners at page 29 of their petition make much of the fact that the witness Rafalow testified that Marcus in his speech had characterized the Union as "a bunch of racketeers and gangsters" and that those exact words are not to be found in a statement which Rafalow made a few days after the meeting at which Marcus spoke (Bd.'s Exh. 8 for Iden.). The statement, however, does contain the following (R. 1190):

> "Mr. Marcus then went on to say: 'Why give your money to outside crooks, have a union among yourselves.' He also said: 'I have nothing against unions, but I don't like to see you giving money to racketeers.'"

The statement also quotes Marcus as having said (R. 1191):

> "Of course, I have no right to discriminate against anyone in the union. That's what the leaflet says the law is. I don't fire anyone for being a member of the union. I fire them because of inefficiency."

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tioner Marcus did not testify. Actually, Rafalow, who was eighteen years old, did not know the meaning of the term "atheist" and incorrectly applied it to himself. At most he was an agnostic (R. 320-2). In any event, he was "first duly sworn" on taking the witness stand (R. 255) and knew the penalties for perjury (R. 320). His testimony was clearly competent and admissible (*N. Y. State Constitution*, Article I, Sec. 3; *N. Y. Civil Practice Act*, Sec. 362; *O'Reilly* v. *People*, 86 N. Y. 154, 159; *Bookman* v. *City of New York*, 200 N. Y. 53, 56; *Brink* v. *Stratton*, 176 N. Y. 150, 157-8; *Peo.* v. *Most*, 128 N. Y. 108; *Wigmore on Evidence*, Vol. 6, p. 327).

On the basis of the entire record, the Board found, and its findings were upheld by the courts below, that petitioners had interfered with, restrained and coerced their employees in the exercise of their right to join or assist a union of their own choosing. The Board's findings of fact were supported by substantial evidence and, therefore, are conclusive.[4]

FREE SPEECH

Petitioners' invocation of the important right of free speech, in an attempt to excuse their interference with their employees' rights, is without merit.

The controlling precedent is the decision of this Court in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469. In that case the National Labor Relations Board found that the employer had interfered with, restrained and coerced its employees in violation of the National Act. Although the employer had engaged in many anti-union acts, the National Board's decision did not indicate whether its finding of interference was based on the whole "complex" of the employer's activities, or whether the finding was based solely on certain statements. As there were grave doubts as to whether the statements, standing alone, were coercive (314 U. S. at 476, 479), this Court remanded the matter for clarification by the National Board.[5]

In the *Virginia Electric* case, this Court stated (p. 477):

> "* * * If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint, or coercion, *pressure*

4. Act, Section 707(2); *Stork Restaurant, Inc.* v. *Boland*, 282 N. Y. 256.

5. The National Board, after the remand, reissued its order without taking further evidence and stated that its finding of interference was based on the employer's conduct, as well as on the statements. That order (44 N. L. R. B. 404) was enforced by the Circuit Court of Appeals (133 F. (2d) 390) and by this Court (319 U. S. 533).

exerted vocally by the employer may no more be disregarded than pressure exerted in other ways.

"If the Board's order here may fairly be said to be based on the totality of the Company's activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for 'messing with the C.I.O.,' the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative powers. *In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done.*" (Italics ours.)

Petitioners' reliance on *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993, 2nd Cir., cert. den. 320 U. S. 768, is misplaced, for there the situation was wholly different from that at bar. In that case there was no anti-union background, no discriminatory discharges and no coercion or intimidation of employees. All that was involved was a letter and a speech made to the employees by the president of the company. These related to a pending election in which the employees were to choose between two unions. The Circuit Court of Appeals pointed out that (134 F. (2d) 995):

"* * * there is no intimation of reprisal against those who thought otherwise; quite the opposite. The

> most that can be gathered from them [the letter and the speech] was an argument, temperate in form, that a union would be against the employees' interest as well as against the employers', and that the continued prosperity of the company depended on going on as they had been."

On the same day that this Court denied certiorari in the *American Tube Bending* case, this Court also denied certiorari in *N. L. R. B.* v. *Trojan Powder Co.*, 135 F. (2d) 337, 3rd Cir. In the *Trojan Powder* case the employer had written a series of letters to its employees, which, as the Circuit Court of Appeals said (135 F. (2d) at 339), contained "no threats" and were "not unusual," in that the company had customarily written letters to its employees. The Court, however, went on to point out (p. 339) that a company foreman had characterized union representatives as "saboteurs" (c.f. the use of "gangsters" and "racketeers" in the case at bar) and, citing the decision of this Court in the *Virginia Electric* case, upheld the Board's order. This Court, as we have said, denied certiorari (320 U. S. 768).

In *N. L. R. B.* v. *M. E. Blatt Co.*, 143 F. (2d) 268, cert. den. U. S. , 89 L. Ed. Adv. Op. 90, the Circuit Court of Appeals, 3rd Circuit, discussing the opinions in the *Virginia Electric* and *American Tube Bending* cases, said (p. 274):

> "We are of the opinion that the Supreme Court intended to indicate and did indicate that communications from the employer to the employee might amount to coercion, but that it was not clear that the Board had found the existence of coercion on sufficient evidence in the cited case. The guaranty of freedom of speech contained in the First Amendment does not guarantee him who speaks immunity from the legal consequences of his verbal actions. This is the substance of our ruling in National Labor Relations Board v. New Era Die Co., 118 F. 2d 500, 505. We reiterated it in the recent contempt proceeding of Edward G. Budd Manufacturing Co. v. National Labor Relations Board, 142 F. 2d 922."

In the *Budd* case, which was a contempt proceeding, cited in the above quotation, the Court pointed out (142 F. (2d) at 927):

> "Whether the constitutionally protected right of free speech has been abused by an expression of fact or opinion, so as to render the matter actionable as a violation of the Wagner Act, comes down to the question whether the assailed utterances constitute, or are in furtherance of, employer domination, coercion or interference in his employees' exercise of their legal rights. The inquiry, therefore, in any relevant connection is whether the challenged statements or opinions contain, or, in the circumstances, can reasonably be construed as containing, threats by the employer of discrimination or other coercive or intimidating action against some employees or an allurement of favoritism to others according to their respective labor affiliations or activities. If the utterances do so offend, then they are actionable, for the Wagner Act is aimed directly at such conduct and furnishes the effective means for its eradication."

Similarly, in *Elastic Stop Nut Corp.* v. *N. L. R. B.*, 8th Cir., 142 F. (2d) 371, it was said (p. 378):

> "As to petitioner's argument concerning constitutional privilege. Valnoski's remarks related to petitioner's determination to establish the kind of labor organization it desired—an independent organization, and while an expression of opinion on labor matters may be protected when such utterances do not constitute coercion under the Act, speech amounting, in connection with other circumstances, to coercion within the meaning of the Act is not protected. * * * The determination of the category into which the remarks fell was a question of fact for the Board, National Labor Relations Board v. Virginia Power & Electric Co., supra, and the Board's finding on the fact may not be disturbed."

Again, in *N. L. R. B.* v. *Laister-Kauffmann A. Corp.*, 8th Cir., 144 F. (2d) 9, the Court declared (pp. 12-13):

> "Under the facts and circumstances and the inferences to be drawn therefrom the Board was within its rights in concluding under the evidence that respondent had engaged in unfair labor practices in violation of Section 8(1) of the Act. The acts and conduct of respondent present a pattern expressive of management hostility to the rights of its employees to choose their labor affiliations independently of management interference; and respondent's attempts to discourage the employees from affiliating with the Union by statement evincing hostility to the Union, veiled threats of discharge, warnings that the plant would shut down because of the Union and interrogation of employees concerning Union affiliation and activities constitute well recognized forms of interference, restraint, and coercion, in violation of Section 8(1) of the Act."

Thus, it is well established that "the right of 'free speech' cannot be invoked as a shield for coercion in violation of the Act."[6] Indeed, the very cases cited by petitioners so hold.[7]

In the cases at bar, the "complex of activities" revealed by the record herein, amply supports the finding of the Board, affirmed by the courts below, that petitioners have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed them by Section 703 of the Act. That finding is based upon largely undenied and uncontraverted testimony as to a long-established anti-union attitude on the part of the petitioners, the unlawful discharges of two employees because of their union activities, the conduct of petitioners in warning employees not to join or assist the Union, thinly veiled threats of discharges if the Union's organizational drive were successful,

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6. *N. L. R. B.* v. *Glenn L. Martin-Nebraska Co.*, 141 F. (2d) 371, 373.

7. *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477, 478; *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993, 994; *Edward G. Budd Mfg. Co.* v. *N. L. R. B.*, 142 F. (2d) 922, 926; *Thomas* v. *Collins*, ... U. S. ..., 89 L. Ed. Adv. Op. 340, 352.

petitioners' suggestion that a company union be formed, and vilification of the Union and its representatives.[8]

Indeed, the remarks made by Marcus and Kaplan, petitioner's manager, were inherently coercive and an interference with the rights of the employees. Marcus' threat to discharge younger employees if the Union were successful, his characterization of the Union as "a bunch of racketeers and gangsters,"[9] his remark, "Why give your money to outside crooks?" and his suggested formation of a company union go far beyond a temperate expression of opinion, such as in *N. L. R. B.* v. *American Tube Bending Co.*, *supra*. Manager Kaplan's warning to an employee to "have nothing to do with the foolish kids who are trying to unionize Foto Shops" and to keep his "nose clean" was more than mere advice. And petitioner Marcus' statement to Bordin that "[he] should have nothing to do with unions and [he] could advance [himself] like Mr. Hervich has" was an obvious attempt to induce Bordin to renounce the Union under promise of future favor.

Petitioners' statements, therefore, clearly contained "threats by the employer of discrimination or other coercive or intimidating action against some employees or an allurement of favoritism to others, according to their respective labor affiliations or activities,"[10] and were not protected by the constitutional privilege of free speech.

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8. Petitioners infer that a circular distributed by the Union vilified and libelled them (petition, p. 18; brief, p. 16). Examination of that circular (Board's Exh. 9, R. 1192) will disclose that petitioners' characterization thereof is wholly without basis. The circular was temperate and factual in character. Petitioners made no attempt to prove that it was false. Their present attempt to justify their coercive remarks as a reply to vilification and libel by the Union is an unwarranted afterthought, not raised before the Board (petitioners' exceptions to Intermediate Report of Trial Examiner, R. 1271-1281).

9. Cf. *N. L. R. B.* v. *Trojan Powder Co.*, 135 F. (2d) 337, 339 (union representatives "sabateurs"); *Oughton* v. *N. L. R. B.*, 118 F. (2d) 486, 489, cert. den. 315 U. S. 797 (union "a bunch of communists and reds"); *N. L. R. B.* v. *N. Carolina Finishing Co.*, 121 F. (2d) 954, 955 (union "a bunch of racketeers"); *N. L. R. B.* v. *Jahn & Ollier Engrav. Co.*, 123 F. (2d) 589, 591 (union officials "don't want you, but want your dues"; be wary of "poison peddlers" and "poison propaganda"; union employees "smart agitators").

10. *E. G. Budd Co.* v. *N. L. R. B.*, 142 F. (2d) 922 at 927.

NO NOVEL OR SUBSTANTIAL QUESTION

That the order which petitioners herein seek to review was made by the New York State Labor Relations Board, and not by the National Labor Relations Board, does not make the question presented novel. The New York State Labor Relations Act and the National Labor Relations Act "are not only alike in their provisions but are almost identical in language," and, hence, Federal decisions are in point and entitled to "great weight."[11] The constitutional right of free speech, of course, is equally applicable to decisions of State Boards, and the decisions of this Court are binding on such Boards. As the New York and National Labor Relations Act are "almost identical in language," the questions which petitioners seek to present are in no respect novel and are fully covered by decisions of this Court.

The pattern of events at bar contains undenied expressions of hostility towards unions, discharge of two employees because they applied for membership in and assisted the Union, and undenied and substantially conceded utterances, which were not only coercive in themselves but were part of a whole pattern of activity designed to discourage and prevent the employees from exercising their right to join a union of their own choosing.

Not one of the cases on which petitioners rely holds that the right of free speech makes such utterances or such conduct on the part of an employer any the less interference with employee rights in violation of the Act.

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11. *Davega City Radio, etc.* v. *N. Y. S. L. R. B.*, 281 N. Y. 13, 22; *Stork Restaurant* v. *Boland*, 282 N. Y. 256, 267; *N. Y. S. L. R. B.* v. *Timen*, 264 App. Div. 120, 122.

Conclusion

The Board's finding, based "on the entire record" (R. 1351), that petitioners interfered with, restrained and coerced their employees in violation of the provisions of the New York State Labor Relations Act, and the order issued thereon, do not infringe upon the petitioners' right of free speech.

We respectfully submit that on the record herein, not only is there no novel question of law presented, but petitioners fail to present any question of substance whatever.

Respectfully submitted,

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